Supreme Court, U.S.
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In The
Supreme Court of the United States

REGINALD L. CYRUS,

Petitioner,

v.

DEPARTMENT OF THE AIR FORCE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

In Bush v. Lucas, 462 U.S. 367 (1983), this Court held that a whistleblower is entitled to meaningful remedies for retaliation, one which is a "trial-type hearing" on the facts of his case. Id. at 387. In Arnett v. Kennedy, 416 U.S. 134 (1974), this Court held that the procedural means which entitled a federal employee "to an evidentiary trial-type hearing" satisfied the Due Process Clause of the Fifth Amendment. Id. at 145, 163.

The Question Presented is:

Whether the Merit Systems Protection Board is permitted to decide the facts of a whistleblower retaliation case without holding a trial-type hearing.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Reginald L. Cyrus respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, 1a-2a) is unpublished, but the decision is noted at 2005 WL 78687 (Fed Cir. January 11, 2005). The decision of the Merit Systems Protection Board (App., infra, 3a-17a) is unpublished.

JURISDICTION

The Court of Appeals' Decision was issued on January 11, 2005.

The Merit Systems Protection Board had jurisdiction pursuant to 5 U.S.C. § 1221(a) and 5 U.S.C. § 2302(b)(8). The Court of Appeals had jurisdiction pursuant to 5 U.S.C. § 7703(b)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment mandates that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. § 1101 et seq.), are as follows:

5 U.S.C. § 7701(a) states:

An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right__

(1) To a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

5 U.S.C. § 7701 is reproduced at App., infra, 46a.

5 U.S.C. § 2302(b)(8) states:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-

take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of-

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences-

(i) a violation of any law, rule, or regulation, or

> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences–
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The pertinent provision of the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, 5 U.S.C. § 1201 et seq.) is as follows:

5 U.S.C. § 1221 states:

> (a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for

> employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.
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> (b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

STATEMENT OF THE CASE

This case demonstrates the failure of the Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals to honor the fundamental right of a federal government whistleblower to a hearing when he has suffered retaliation by being deprived of a property interest for exposing government waste, fraud, and abuse. In so doing, the MSPB flouts the clear Congressional mandate that requires the MSPB to provide hearings to whistleblowers under the Civil Service Reform Act and the Whistleblower Protection Act. 5 U.S.C. § 1221; 5 U.S.C. § 2302; 5 U.S.C. § 7701. In addition, because this Court has limited the recourse of an aggrieved whistleblower to the administrative and judicial procedures codified by these Acts, the denial of the trial-type hearing they require is a violation of a whistleblower's rights under the Due Process

Clause of the Fifth Amendment. See Bush v. Lucas, 462 U.S. 367 (1983); Arnett v. Kennedy, 416 U.S. 134 (1974).

A. Background

Petitioner Reginald L. Cyrus jeopardized a life-long career with the United States Air Force in order to expose a fraud on the United States government. Mr. Cyrus observed that his co-worker, Mr. Rory LuBould, was continuing to draw a government salary while working full-time for a defense contractor. In a public-spirited bid to end this fraud, Mr. Cyrus called Mr. LuBould's conduct to the attention of his command, with the result that Mr. LuBould was terminated. Needless to say, the supervisors, Mr. Timothy Chalfant and Col. Gail Nusz, who had tolerated the ongoing fraud perpetrated by Mr. LuBould, were highly embarrassed once Mr. Cyrus exposed it. While Col. Nusz and Mr. Chalfant were not immediately in a position to vent more than petty spite against Mr. Cyrus, which Col. Nusz did by disparaging Mr. Cyrus in front of her colleagues (necessitating another embarrassing apology when she was called to account by Mr. Cyrus's supervisor), they clearly harbored a grudge against Mr. Cyrus for his protected activity. Several years later, an opportunity arose for them to exact real retribution on Mr. Cyrus, when he was assigned to their supervision as part of a "paybanding" OPM Demonstration Project, which gave managers greater flexibility in determining the ratings and pay of their subordinates. Col. Nusz, who performed a preliminary or "mock" paybanding rating of Mr. Cyrus, and Mr. Chalfant, who participated in Mr. Cyrus's actual paybanding rating, seized the opportunity to reduce his rating and thus dock his pay by denying him his federally mandated 3.8 percent pay increase.

B. Proceedings Below

1. Recognizing immediately that Col. Nusz and Mr. Chalfant had retaliated against him for blowing the whistle earlier on their toleration of the fraudulent practices of Rory LuBould, Mr. Cyrus promptly appealed to the MSPB for a hearing on his reduction in pay and other retaliatory actions by Col. Nusz and Mr. Chalfant. MSPB Administrative Judge ("AJ") Philip Reed denied Mr. Cyrus's appeal on jurisdictional grounds, finding incorrectly that Mr. Cyrus had not exhausted his remedies at the U.S. Office of Special Counsel and was therefore not entitled to a hearing. See Initial Decision, Cyrus v. Department of the Air Force, No. SF-1221-01-0172-W-1 (M.S.P.B. Oct. 3, 2001), reproduced at App., infra. 29a-49a, upheld by the full Board in its Final Order, Cyrus v. Dep't of the Air Force, No. SF-1221-01-0172-W-1 (M.S.P.B. August 5, 2002), reproduced at App., infra, 24a-28a.

2. On appeal, the U.S. Court of Appeals for the Federal Circuit reversed AJ Reed's decision finding that Mr. Cyrus had not exhausted his remedies and remanded the case for a hearing with instructions that there was "no bar to the Board's exercise of jurisdiction." See Cyrus, 2003 WL 22495842 (Fed. Cir., Oct. 31, 2003), reproduced at App., infra, 18a-23a.

3. Despite the Federal Circuit's reversal and remand, AJ Reed again demonstrated his disdain for Mr. Cyrus's case and, without even granting Mr. Cyrus discovery on this issue, denied Mr. Cyrus his constitutional and statutory right to a hearing on the grounds that the Board lacked jurisdiction, the same issue already decided in the Federal Circuit remand. See Cyrus v. Dep't of the Air Force, No. SF-1221-01-0172-M-1 (M.S.P.B., April 8, 2004), App., infra., at 12a. In so doing, Judge Reed deviated from the Federal Circuit's determination that Mr. Cyrus met the

jurisdictional requirements and wantonly violated Mr. Cyrus's constitutional right to a hearing under the Due Process Clause of the Fifth Amendment and his statutory right to a hearing under the Civil Service Reform Act and the Whistleblower Protection Act.

4. Mr. Cyrus was again forced to appeal AJ Reed's decision. This time the Federal Circuit blinked and failed to enforce its own, previous decision and, instead, affirmed AJ Reed's most recent decision without an opinion.[1] It is from this decision that Mr. Cyrus is petitioning this Court for review.

REASONS FOR GRANTING THE PETITION

The U.S. Congress and this Court have long recognized that whistleblowers serve an essential function in ensuring that the federal government operates honestly and efficiently. See 5 U.S.C. § 1201(a); Waters v. Churchill, 511 U.S. 661, 624 (1974). Congress recognized the importance of public scrutiny of the government's actions when it enacted the Whistleblower Protection Act, 5 U.S.C. § 1201 et seq., so that whistleblowers would have some protection from their agency officials when they serve the taxpayers' interests and expose waste, fraud, or abuse in the government.

Since the enactment of the Civil Service Reform Act of 1978, the Congress has entrusted the duty to safeguard the rights of federal whistleblowers to the Merit Systems Protection Board. 5 U.S.C. § 7701. Whistleblowers "serve the public interest by assisting in the elimination of fraud,

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[1]The Air Force's argument, which the MSPB Judge embraced, that Air Force officials working on the same base as Mr. Cyrus could not hold a grudge against him are virtually nonsensical. The Federal Circuit could not endorse this view even when it declined to intervene and could not bestir itself to write out a rationale.

waste, and abuse and unnecessary Government expenditures." 5 U.S.C. § 1201(a)(1). The protection of whistleblowers who disclose "[g]overnment illegality, waste, and corruption is a major step toward a more effective civil service." 5 U.S.C. § 1201(a). The Congress recognized, however, that whistleblowers are subject to a real risk of retaliation. See Saudi Arabia v. Nelson, 507 U.S. 349, 365-66 (1993)("retaliation for whistleblowing is not a practice foreign to the marketplace"). As a result, whistleblowers are unlikely to come forward if doing so leads to smear campaigns, pay cuts, demotions, terminations, or other retaliatory acts. See Jackson v. Birmingham Board of Education, No. 02-1672, Slip Op. at 11, (U.S. March 29, 2005). For this reason, Congress has made protection of whistleblowers a high priority by giving them a right to a hearing. 5 U.S.C. § 7701; see Waters, 511 U.S. at 674.

Two decades ago in Bush v. Lucas, this Court recognized that a federal whistleblower is guaranteed a hearing if he or she is subjected to retaliation. 462 U.S. at 386. In Bush, the Court found that the Civil Service Reform Act provided meaningful remedies to a whistleblower subjected to retaliation, and held that all other means of redress were therefore foreclosed. Id. at 385-86. In so doing, this Court implicitly found that the Reform Act met the requirement of constitutional due process that a federal employee deprived of a property or liberty right in his employment was entitled to a hearing. See Arnett v. Kennedy, 416 U.S. at 157.

This case demonstrates that both the Merit Systems Protection Board and the Federal Circuit are flagging in their responsibility to see that whistleblowers receive the due process hearing that they are guaranteed both by the Constitution and by statute. Review is necessary in this case

to ensure that the commitment of the federal government to protection of whistleblowers is honored.

I. CERTIORARI IS REQUIRED BECAUSE WHISTLEBLOWERS ARE BEING DEPRIVED OF THE HEARING REQUIRED BY BUSH V. LUCAS.

1. This Court has long held that the Civil Service Reform Act provides administrative procedures and judicial review as the sole remedy for a whistleblower who has been subjected to retaliation. The Court reasoned that the Reform Act provides federal civil servants with "an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures - administrative and judicial - by which improper action may be redressed." Bush 462 U.S. at 385. Furthermore, the scheme "provides meaningful remedies for employees" who have been retaliated against for whistleblowing by requiring "a trial-type hearing at which the employee could present witnesses, cross-examine the agency's witnesses, and secure the assistance of agency officials." Id. at 386, 387. Such a hearing is explicitly guaranteed by the Civil Service Reform Act and the Whistleblower Protection Act, which give employees an Individual Right of Action and states that an employee who has a right to appeal to the MSPB "shall have the right to a hearing for which a transcript will be kept." 5 U.S.C. § 1221; 5 U.S.C. § 7701(a).

The MSPB has itself recognized the absolute nature of this right and acknowledged that MSPB appeals are not to disposed of through summary judgment. "An appellant's right to a hearing in a Board appeal is of cardinal importance and is not contingent upon her showing of a genuine issue of material facts." Conant v. OPM, 79 M.S.P.R. 148, 150 (July 22, 1998). So important is the right to a hearing that an appellant may waive the right only by "clear, unequivocal, or decisive action." Id. In this case,

however, the MSPB has turned its back on its own case law and this Court's holding in Bush v. Lucas.

2. Reginald Cyrus's case is typical of the quandary in which a federal whistleblower is likely to find himself. After having his pay docked because he exposed a fellow Air Force employee who was cheating the government, Mr. Cyrus expected that he could find meaningful remedies through the Merit Systems Protection Board, a federal employee's sole avenue of redress under Bush v. Lucas. Bush, 462 U.S. at 386, 387 n.33. Mr. Cyrus reasonably expected that he would be able to engage in discovery, depose the necessary witnesses, and participate in a "trial-type hearing" in order to challenge the Air Force's unlawful reduction of his pay. Instead, Mr. Cyrus was thwarted at every turn, unable to depose key witnesses, and required to ride a roller coaster of appeals up to the Federal Circuit and back down to the MSPB without ever having a hearing on his appeal.

II. CERTIORARI SHOULD BE GRANTED BECAUSE FEDERAL EMPLOYEES WHO HAVE BEEN DEPRIVED OF PROPERTY AND LIBERTY RIGHTS IN THEIR EMPLOYMENT HAVE A DUE PROCESS RIGHT TO A HEARING.

1. In Arnett v. Kennedy, this Court held that civil service protections create constitutionally protected liberty and property interests in federal employment, and that an employee may not be deprived of those interests without due process. See 416 U.S. 134, 151-52, 155 (1974). Clarifying its ruling in Arnett, this Court held that employees deprived of a liberty or property interest must have "the opportunity for [a] hearing appropriate to the nature of the case." Cleveland Bd. Of Education v. Loudermill, 470 U.S. 532, 542 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)). "In almost every setting where important decisions turn on

questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

Mr. Cyrus was deprived of rights in his employment both because he suffered a loss of pay and benefits[2] and because his reputation was harmed when he received an unreasonably low rating for his contributions under the Air Force's Contribution-based Compensation and Appraisal System ("CCAS") in retaliation for his blowing the whistle. See Arnett, 416 U.S. at 167 (Powell, J. concurring in part and concurring in the result in part); id. at 163 (finding that employees have a liberty interest in protecting their good names and reputations in the workforce).

2. The only avenue open to federal employees to receive due process is through the provisions of the Civil Service Reform Act and the Whistleblower Protection Act; this Court has foreclosed all other avenues (e.g. actions under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). See Bush 462 U.S. at 388-90. Consequently, it is of paramount importance to the rights of federal employees and to the operation of the federal government that whistleblowers be given their fundamental right to a trial-type hearing when their property has been taken and their reputations have been injured. This is the function for which the MSPB was created, as this Court recognized in Bush v. Lucas, and it is the function which the MSPB must be required to fulfill. See id. at 386, 387 n.33.

3. As this case shows, the Federal Circuit and the MSPB have grown lax in their enforcement of federal whistleblower rights. If this Court does not act, there is little hope that the disregard of whistleblower rights will ever be corrected by the Federal Circuit and the MSPB. The Federal

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[2]Each deprivation of a property right appealable to the MSPB involves loss of pay. See 5 U.S.C. § 7512; 5 U.S.C. § 2302(a)(2)(A)(8) & (9).

Circuit in this case has manifested itself as impotent and unconcerned to remedy the MSPB's disregard of its duties, affirming the decision in the Cyrus case without even issuing an opinion. As for the MSPB, it has demonstrated that it will avail itself of any colorable procedural technicality to avoid conducting the trial-type hearings for federal employees that are the sole reason for its existence. What the MSPB and the Federal Circuit have provided Mr. Cyrus is neither "meaningful" nor a "remedy," and as such does not comport with constitutional due process.

Respectfully submitted,

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